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IN THE SUPREME COURT OF THE UNITED STATES

October 1994 Term

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SOCIÉTÉ DE BANQUE PRIVÉE, f/k/a SAUDI EUROPEAN BANK, S.A., a French Company, now known as Société d'Analyses et d'Etudes Bretonneau,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, as conservator for Lincoln Savings and Loan, F.A., a Federal savings and loan association,

Respondent.

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Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

# Supplement to the Petition for Writ of Certiorari

Robert Ted Parker
Berg, Ziegler, Anderson & Parker
Four Embarcadero Center, Suite 1400
San Francisco, CA 94111
(415) 397-6000

41 pp

TABLE OF CONTENTS


| | Page |
|---|---|
| REFERENCE TO OPINION | 1 |
| JURISDICTION | 1 |
| INTRODUCTION | 1 |
| ARGUMENT | 3 |

## TABLE OF AUTHORITIES


Page

Cases

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) . . . . . 8

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) . . . . . 7

Celotex v. Catrett,
477 U.S. 317 (1986) . . . . . 7-9

Clark v. Coats & Clark, Inc.,
929 F.2d 604 (11th Cir. 1991) . . . . . 9

Cristobal v. Siegel,
___ F.3d ___, 94 C.D.O.S. 4693
(9th Cir. 1994) . . . . . 1, 2, 5, 6, 9, 10

Henry v. Gill Industries, Inc.,
983 F.2d 943 (9th Cir. 1994) . . . . . 1, 3, 5, 6, 9, 10

Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima,
776 F.2d 1277 (5th Cir. 1985) . . . . . 4

Statutes and Rules

Federal Rule of Civil Procedure 56 . . . . . 3-5, 7, 9, 10

Federal Rule of Civil Procedure 83 . . . . . 4

# Supplement to the Petition for Writ of Certiorari

## REFERENCE TO OPINION

The Court of Appeals opinion, Cristobal v. Siegel, ___ F.3d___, 94 C.D.O.S. 4693 (9th Cir. 1994), filed on June 23, 1994, is reprinted as Appendix A to this supplement to the petition.

## JURISDICTION

The petition for a writ of certiorari was filed with the United States Supreme Court on June 22, 1994. Pursuant to Rule 15.7 of the Rules of the Supreme Court of the United States, this supplement to the petition for a writ of certiorari calls attention to case authority not available at the time of the filing, and is entered during the time the petition for writ of certiorari is still pending.

## INTRODUCTION

We wish to call to the Court's attention a decision from the Ninth Circuit, Cristobal v. Siegel, ___ F.3d ___, 94 C.D.O.S. 4693 (9th Cir. 1994) (reprinted as Appendix A to this supplement), which has come down since our petition for writ of certiorari was filed. Cristobal reaffirms the Ninth Circuit's commitment to the rule of

law announced in Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1994). Specifically, unless a moving party's papers are sufficient to support its motion for summary judgment, a district court abuses its discretion by granting the motion pursuant to a local rule permitting it to deem the failure to file an opposition consent to granting the motion summarily. Cristobal categorically states that under no circumstances may summary judgment be entered unless the movant has met its initial burden under Rule 56 of the Federal Rules of Civil Procedure. Nominally, the disagreement we have with the panel that decided this appeal below is over the proper standard for summary judgment. The deeper concern, however, is whether the panel will be permitted to apply an indefensible summary judgment standard in order to evade the application of the Ninth Circuit's own clearly stated and well-settled rule of law regarding local rules of practice. We ask the Court to act to set right what any fair minded person can only conclude is a manifest miscarriage of justice.

## ARGUMENT

The district court granted summary judgment against petitioner Bretonneau[1] as to its counterclaims on the basis of a local rule providing that the failure to file and serve an opposition may be deemed consent to granting the motion summarily. No opposition was filed because respondent Resolution Trust Corporation chose to serve its moving papers on the party Bretonneau directly, mailing them to an outdated Paris address, rather than on the attorney with whom they had been dealing and who they understood was to represent Bretonneau. As a consequence neither Bretonneau nor counsel knew a motion had been filed. Petition at 3-6.

In Henry, the Ninth Circuit held that it is an abuse of discretion to grant summary judgment pursuant to the local rule where the movant's papers are not sufficient to support the motion. In Henry, the moving papers were not sufficient to support the motion because they failed to satisfy the movant's initial burden under Rule 56 of the Federal Rules of Civil Procedure. The court

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[1] Société de Banque Privée, now known as Société d'Analyses et d'Etudes Bretonneau, referred to in our petition for writ of certiorari and in this supplementary brief as "Bretonneau."

reasoned that a local rule of practice could not contravene the requirements of Rule 56 regarding a movant's initial burden:

> The doubts expressed in these cases were founded on an appreciation of the interrelationship between Rule 56 and Rule 83. Federal Rule of Civil Procedure 83 invites the district courts to formulate local rules, but only insofar as they are not inconsistent with the federal rules themselves. Under Federal Rule of Civil Procedure 56, a moving party is entitled to summary judgment only upon a showing that there are no genuine issues of material fact requiring a trial. The party opposing the motion is under no obligation to offer affidavits or any other materials in support of its opposition. Summary judgment may be resisted and must be denied on no other grounds than that the movant has failed to meet its burden of demonstrating the absence of triable issues. A local rule that requires the entry of summary judgment simply because no papers opposing the motion are filed or served, and without regard to whether genuine issues of material fact exist, would be inconsistent with Rule 56, hence impermissible under Rule 83. See Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985) ("A motion for summary judgment cannot be granted simply because there is no opposition, even if the failure to oppose violated a local rule.").
>
> In this case, as in Hamilton and Mutual Fund Investors, the local rule at issue does not require the court to grant a motion for summary judgment when the non-moving party fails to file and/or serve its opposition thereto. The language of the rule is permissive, conferring discretion upon the district judge to determine whether non-compliance should be

> deemed consent to a given motion. That discretion, however, is necessarily abused when exercised to grant a motion for summary judgment where the movant's papers are insufficient to support that motion or on their face reveal a genuine issue of material fact.

Henry, 983 F.2d at 949-50.

In Cristobal, the Superior Court of Guam entered summary judgment against plaintiffs, the Cristobals, pursuant to Guam Rule of Civil Procedure 56 (which tracks Federal Rule of Civil Procedure 56) and Guam Rule of Court 3(c), which provides that the failure to file a memorandum of points and authorities in opposition to a motion for summary judgment constitutes consent to granting the motion. The District Court of Guam Appellate Division affirmed. The Cristobals appealed to the Ninth Circuit.

The Ninth Circuit ruled that decisions interpreting Federal Rule of Civil Procedure 56 applied to Guam's analogous rule, and thus that Henry was controlling. 94 C.D.O.S. at 4694. The court emphasized that under Henry, summary judgment is never proper unless the movant satisfies its initial burden:

> Within the Ninth Circuit a federal trial court cannot grant summary judgment under the Federal Rules unless the moving party bears its burden of showing its entitlement to judgment.

Id. at 4694. The record before the court failed to show whether the Superior Court had evaluated the sufficiency of the moving papers. The court therefore reversed the Appellate Division's affirmance and remanded with instructions to remand in turn to the Superior Court for its independent determination as to the sufficiency of the movant's papers. 94 C.D.O.S. at 4696.

In so ruling, the court warned against misuse of the local rule:

> This court's deepest concern in this case is to see that the courts within this circuit do not use rules of practice as the basis for entering summary judgment without independently evaluating the sufficiency of the moving papers. Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1993).

94 C.D.O.S. at 4696.

In the present case, did the district court independently evaluate the sufficiency of RTC's moving papers? The record does not show that the district court gave any thought whatsoever to this question before applying the local rule.

Did the moving papers satisfy RTC's initial burden under Rule 56? RTC submitted no declarations and made no references to the pleadings or other materials. Instead, it simply stated that Bretonneau could not prove its case, and that as the party who would bear the burden at trial, had the burden of coming forward with evidence. RTC thus relied on an interpretation of Celotex v. Catrett, 477 U.S. 317 (1986) that has been uniformly and decisively rejected in the appellate decisions of other circuits. RTC's entire showing was the following statement from its memorandum of points and authorities:

> Banque Privee has asserted a setoff against the $8 million deposited by Lincoln Savings. That asserted setoff is the basis for Banque Privee's counterclaim. Banque Privee, however, bears the burden of presenting evidence to support that claim, failing which the claim must be rejected [citing Celotex, 477 U.S. at 322-23 and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)]. Inasmuch as there is no evidence in the record to sustain Banque Privee's claim, judgment must be entered against defendant on the counterclaim unless defendant comes forward in its response with evidence to support each element.

Petition, Appendix G at G-3.

As the Eleventh Circuit has pointed out, this is a mischaracterization of Celotex and is inconsistent with the rule of Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

Banque Privee had no burden of presenting evidence unless RTC first met its initial burden under Rule 56:

> The Court established an exception to the Adickes rule for this uncommon situation. We must emphatically state, however, that the Court did not overrule Adickes. Rather, the Court reiterated that "[o]f course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323, 106 S.Ct. at 2553 (quoting Fed. R. Civ. P. 56(e)). No Justice in either the majority or the dissent in Celotex ever questioned that the Adickes rule remained the generally applicable rule.[] In fact, most of the discussion in both the majority and dissenting opinions concerned what constitutes a "showing" of the absence of a genuine issue of material fact sufficient to meet the movant's burden under Rule 56. See Celotex 477 U.S. at 323-25, 106 S.Ct. at 2553-54; id. at 331-33, 106 S.Ct. at 2557-58 (Brennan, J., dissenting); see also id. at 328-29, 106 S.Ct. at 2555 (White, J., concurring in opinion and judgment of Court).
>
> To summarize, the Adickes rule remains the general rule. The moving party bears the initial

> burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment. Celotex did not change the general rule. Celotex simply holds that under certain circumstances the movant may meet its Rule 56 burden without negating an element of the non-moving party's claim and that under such circumstances it is sufficient to point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden. Even after Celotex it is never enough simply to state that the non-moving party cannot meet its burden at trial.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991) (footnote omitted).

As we have pointed out in our petition, both the Fifth and Eleventh Circuits have repeatedly held, in agreement with Justice White's concurring opinion in Celotex, that a conclusory assertion such as the one relied on by RTC in the present case does not satisfy a movant's initial burden under Rule 56. Petition at 12-16.

Henry held that a district court abuses its discretion when it grants summary judgment pursuant to the local rule when the movant has failed to meet its initial burden. Cristobal emphasizes the broader, categorical principle that leads to this conclusion: Under

no circumstances can a court ever grant summary judgment unless the moving party has met its initial burden under Rule 56.

The nominal dispute we have with the panel that decided this case is whether the statement from RTC's moving papers quoted supra satisfies RTC's initial burden under Rule 56. The panel says it does. We have pointed out to the panel that Justices White and Brennan and the Fifth and Eleventh Circuits would say it does not. We have asked the panel, in our petition for rehearing, how it is that to simply make an unsupported, conclusory assertion is to satisfy any burden at all. The panel has declined to respond.

We do not believe there is any conceivable reasoned basis for the position the panel has taken with regard to the standard for summary judgment, and therefore can only conclude that the panel has been pushed to this extreme in its determination not to apply the rule of law announced in Henry. Cristobal shows the Ninth Circuit's firm commitment to this rule of law, and reiterates that a district court cannot grant summary judgment unless it first independently evaluates the sufficiency of the moving papers and determines that the movant has met its initial burden under Rule 56.

Thus, while the nominal dispute is over the standard for summary judgment, the deeper question presented is whether the panel will be required to follow the Ninth Circuit's own rule of law.

The judgment in this case deprived Bretonneau of a meritorious counterclaim amounting to some $8 million. RTC achieved this judgment by serving its papers in a way the district court itself had to concede was suspect. Petition at 6, Appendix D at D-12. The panel's refusal to follow its own rule of law perpetuates a patent injustice. We ask the Court to issue its writ and reverse the judgment of the Court of Appeals.

Dated: August 12, 1994

BERG, ZIEGLER, ANDERSON & PARKER
Four Embarcadero Center, Suite 1400
San Francisco, CA 94111
Telephone: (415) 397-6000
Facsimile: (415) 397-9449

By: _____
Robert Ted Parker
Attorneys for Petitioner
SOCIÉTÉ DE BANQUE PRIVÉE, f/k/a SAUDI EUROPEAN BANK, S.A., a French Company, now known as Société d'Analyses et d'Etudes Bretonneau

IN THE SUPREME COURT OF THE UNITED STATES

October 1994 Term

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SOCIÉTÉ DE BANQUE PRIVÉE, f/k/a SAUDI EUROPEAN BANK, S.A., a French Company, now known as Société d'Analyses et d'Etudes Bretonneau,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, as conservator for Lincoln Savings and Loan, F.A., a Federal savings and loan association,

Respondent.

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Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

# Appendix A to Supplement to the Petition for Writ of Certiorari

# NINTH CIRCUIT COURT OF APPEALS

Cite as 94 C.D.O.S. 4693

**ADRIAN L. CRISTOBAL, et al., Plaintiffs-Appellants,**

**v.**

**JEFFREY SIEGEL, et al., Defendants-Appellees.**

No. 92-16642
United States Court of Appeals for the Ninth Circuit
D.C. No. CV-91-00095A
Appeal from the United States District Court for the District of Guam, Appellate Division, Hons. Brown, Munson, and Hatter, Judges, Presiding
Submitted November 3, 1993* Honolulu, Hawaii
Before: Cecil F. Poole, Charles Wiggins and Thomas G. Nelson, Circuit Judges.

COUNSEL

Peter F. Perez, Agana, Guam, for the plaintiffs-appellants.
Barry K. Tagawa, Long & Levit, San Francisco, California, for the defendants-appellees.
Filed June 23, 1994

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* Pursuant to Ninth Circuit Rule 34-4, the panel unanimously finds this case suitable for disposition without oral argument.

POOLE, Circuit Judge:

Appellants ("the Cristobals") challenge an order of the District Court of Guam Appellate Division ("Appellate Division") affirming the grant of summary judgment by the Superior Court of Guam ("Guam Superior Court") in favor of Appellees Jeffrey Siegel, Francis Gill, Brian Hanohano, and Coral Pit, Inc. ("Coral Pit"). Coral Pit filed a motion for summary judgment in early January 1991. The Cristobals failed to file a timely memorandum of points and authorities in opposition to the motion. Guam Rule of Court 3(c) provides that failure to file a memorandum of points and authorities in opposition to a motion constitutes consent to the granting of that motion. The Guam Superior Court deemed that the Cristobals had consented to Coral Pit's motion for summary judgment under Rule 3(c) because the Cristobals did not file opposition papers and entered summary judgment in favor of Coral Pit. We reverse and remand.

## I. FACTUAL & PROCEDURAL BACKGROUND

This appeal arises out of protracted litigation regarding a lease agreement. The Cristobals brought suit against Coral Pit in

June 1988 alleging fraud, cancellation of instruments, forgery, and slander of title. Coral Pit counterclaimed to have title of property quieted in Coral Pit. By August 1989 Coral Pit had successfully obtained either summary judgment for or dismissal of each of the Cristobals' causes of action.

Subsequently, the parties began settlement negotiations. On March 12, 1990, the Cristobals' counsel, Lawrence Teker ("Teker"), wrote to Coral Pit's counsel, Thomas J. Lannen ("Lannen"), confirming that he had met with the Cristobals, that they agreed to a settlement proposal, but that they were reviewing the final document.

On March 16, 1990, Teker again wrote to Lannen, stating "As I mentioned I still don't have the authority to give you this letter but I think I will." Attached was an unsigned letter proposing a settlement dated March 9, 1990.

On April 2, 1990, Lannen's office received a copy of the March 9, 1990 letter proposing settlement, this time signed by Teker. Lannen responded in an April 24, 1990 letter stating, "On behalf of all the defendants, the offer is hereby accepted." After

reiterating the terms set out in Teker's letter, Lannen closed by noting "I believe the parties all agree to add two additional terms, which have always been included in past discussions." These terms included a letter from Judge Lamorena, one of "the Cristobals," absolving Coral Pit of any fraud, and an agreement that the Cristobals would not oppose rezoning of the property. We have no record of Teker's response, if any.

Nearly five months later, on September 13, 1990, Lannen again wrote to Teker, this time complaining of the Cristobals' delay in reviewing and executing "the Settlement Agreement." Lannen stated that regardless of whether a settlement agreement were executed, "it is our position that a settlement of this matter has been reached. While I believe our correspondence clearly reflects our agreement, should there be any doubt, this is again to affirm that we accept your offer of settlement as set forth in your March 9, 1990 letter which you delivered on your client's behalf." Lannen warned that if the settlement documents were not forthcoming that he would seek court enforcement of the settlement.

On September 20, 1990, David Lujan ("Lujan") wrote to Lannen informing him that he had replaced Teker as counsel for the Cristobals, and that his clients rejected any settlement discussed between Teker and Lannen. Lujan formally appeared as counsel of record for the Cristobals on September 27, 1990.

On January 3, 1991, Coral Pit filed a motion for summary judgment seeking enforcement of the purported settlement agreement. Attached to the motion were copies of the letters described above. The motion was noticed for hearing on January 17, 1991. The Cristobals had until January 10, 1991 to file their response, or a motion for leave to file a late brief. Not until January 15, 1991 did the Cristobals file a motion to permit late filing of their opposition papers, as well as an ex parte application for order shortening time for hearing on that motion.

The Guam Superior Court heard the motion to permit late filing on January 15, 1991. First, the court continued the summary judgment hearing from January 17, 1991 to January 24, 1991. Then the court denied the motion to permit late-filed opposition. Then the court deemed the motion for summary judgment consented to under

Rule of Court 3(c). According to the court this "consent" to summary judgment mooted the summary judgment hearing scheduled for January 24, 1991. On this basis the court granted summary judgment to Coral Pit.

The Cristobals filed a motion for reconsideration, but then withdrew the motion because no final judgment had been entered pursuant to Guam Rule of Civil Procedure 59(e). On May 17, 1991 the Cristobals moved for entry of final judgment pursuant to Guam Rule of Civil Procedure 54(b). The Guam Superior Court entered a judgment enforcing the terms of the alleged settlement agreement on October 9, 1991. The Cristobals filed a notice of appeal to the Appellate Division on November 13, 1991. The Appellate Division affirmed the Guam Superior Court's entry of summary judgment holding that the Guam Superior Court did not err when it found that there was no excusable neglect in the Cristobals' failure to timely file an opposition to Coral Pit's motion for summary judgment. The Cristobals timely appealed to this court.

## II. STANDARD OF REVIEW

Guam v. Yang, 850 F.2d 507, 511 (9th Cir. 1988) (en banc) established that this court reviews the interpretations of Guam law by the District Court of Guam Appellate Division de novo. This court reviews the decision of the trial court, the Guam Superior Court, as if it had not been heard previously by an appellate court. Guam v. Ignacio, 10 F.3d 608, 611 (9th Cir. 1993); accord Aguon v. Calvo, 951 F.2d 1131, 1132-33 (9th Cir. 1991) (after remand to Guam Superior Court "to obtain the benefit of the lower courts' construction of the Guam Marketable Title Act, we must now review that construction de novo."); Petition of Government of Guam, 869 F.2d 1326, 1327 (9th Cir. 1989) (de novo review of Guam Superior Court's interpretation of Guam Civil Code).

Coral Pit argues that this case turns on an interpretation of local procedural rules, specifically whether the Guam Superior Court erred in finding no excusable neglect by the Cristobals' counsel when failing to file opposition papers. Consequently, Coral Pit urges the panel to apply an abuse of discretion standard. In Lynn v. Chin Heung International, Inc., 852 F.2d 1221, 1222 (9th Cir. 1988)

and Guam Sasaki Corp. v. Diana's Inc., 881 F.2d 713, 716 (9th Cir. 1989), however, we carefully distinguished between the deference owed to local rules regarding "the methodology of docket management adopted by the local courts," (abuse of discretion) and local rules which govern "challenges to the substantive sufficiency of pleadings" (de novo). Lynn, 852 F.2d at 1222. Since a motion for summary judgment challenges the substantive sufficiency of a complaint, we review the Guam Superior Court's grant of summary judgment de novo. See Hyon-Su v. Maeda Pacific Corp., 905 F.2d 302, 304 (9th Cir. 1990) (grant of summary judgment by Guam Superior Court reviewed de novo).

## III. DISCUSSION

### A. Summary Judgment and Rules of Practice

Within the Ninth Circuit a federal trial court cannot grant summary judgment under the Federal Rules unless the moving party bears the burden of showing its entitlement to judgment.

> A local rule that requires the entry of summary judgment simply because no papers opposing the motion are filed or served, and without regard to whether genuine issues of material fact exist, would be inconsistent with Rule 56, hence impermissible

> under Rule 83 [which prohibits rules of court inconsistent with the Fed. R. Civ. P.].

Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993) (construing the Federal Rules); See also Hoover v. Switlik Parachute Co., 663 F.2d 964, 967 (9th Cir. 1981) (where no opposition to motion filed, summary judgment still inappropriate if there is insufficient evidence to support the motion). For reasons which we elaborate below, this Ninth Circuit construction of the Federal Rules of Civil Procedure applies to Guam Rule of Civil Procedure 56. Consequently, the Guam Superior Court erred by granting summary judgment based on the Cristobals' "consent," because this consent was only a constructive consent based on the strict application of Guam Rule of Court 3(c). This application of Guam Rule of Court 3(c) relieved Coral Pit of its burden to demonstrate its entitlement to summary judgment and the trial court of its responsibility to independently evaluate the sufficiency of the motion, contrary to the Ninth Circuit's substantive requirements for summary judgment.

1. Relationship Between the Guam Rules of Court and the Guam Rules of Civil Procedure

Coral Pit argues that our interpretation of the relationship between the Federal Rules of Civil Procedure and local federal court rules should not govern the relationship between the Guam Rules of Civil Procedure and the Guam Rules of Court because the Guam Rules of Court supersede the Guam Rules of Civil Procedure.

Coral Pit's argument depends upon a tortured reading of the former Guam Rule of Court 1, in force at the time of the Guam Superior Court's decision, which provided that "All rules in conflict with these rules shall be of no further force or effect to the extent of the conflict." Coral Pit urges us to read this clause to mean that the Guam Rules of Court supersede the Guam Rules of Civil Procedure.

We do not read the clause so broadly. The former Guam Rule of Court 1 should be read as nullifying all other rules of practice inconsistent with the Rules of Court. Were Guam Rule of Court 1 read to make the Guam Rules of Court preeminent over the Guam Rules of Civil Procedure by virtue of this one clause we might be opening the door to conflicting interpretations between the

Guam Rules of Court and the Guam Rules of Evidence, the Guam Rules of Probate, etc. We decline to open that door.

The legislature expressed this concern in its enabling statute for the Guam Rules of Court. The enabling statute says that rules promulgated under its authority shall not abridge, enlarge, or modify any substantive right. To deem consent to a grant of summary judgment on the basis of a rule of practice modifies a litigant's substantive rights.[1]

Coral Pit notes that their argument is specifically supported by the commentary to the recently revised Guam Rules of Court which states that the Guam Rules of Court which were in effect at the time of defendants' motion for summary judgment "were, according to their own terms, superior to the Rules of Civil Procedure. The new rules expressly provide to the contrary." This commentary by itself, however, is less persuasive than the practice

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[1] In their briefs the Cristobals question the basic legitimacy of the Guam Rules of Court purportedly in effect at the time of the summary judgment motion. Specifically, the 1979 Rules of Court purport to derive their authority from Guam Code Civ. P. § 123, a statute which had been repealed for five years prior to promulgation of the Guam Rules of Court. The repeal, however, was in fact a recodification. A nearly identical authorizing statute is found in Guam Code Civ. P. § 66.

of the Guam Superior Court which itself recognized the supremacy of the Rules of Procedure over the Rules of Court as outlined in Guam Rule of Civil Procedure 83. We take judicial notice of the fact that on at least one occasion, a majority of Guam Superior Court judges amended the Rules of Court pursuant to Rule 83.

Finally, Coral Pit argues that the 1979 Guam Rules of Court, which were in effect at the time the Guam Superior Court ruled on the motion for summary judgment, had been promulgated by the Judicial Council after the Guam Rules of Civil Procedure, and therefore the legislative decree of Guam Rule of Court 1 supersedes the previously enacted Rules of Civil Procedure. This is false. Coral Pit argues from the erroneous belief that the 1974 Rules of Civil Procedure governed. New Rules of Civil Procedure took effect in 1990, after the 1979 Rules of Court. See 7 Guam Code Ann. A-1, A-2, B-1.

Consequently, we conclude that the Guam Rules of Court which were in effect at the time the Guam Superior Court considered the motion for summary judgment were rules of practice which did

not supersede the substantive requirements of the Guam Rules of Civil Procedure.

2. Ninth Circuit Precedent

Coral Pit argues that even if Guam Rule of Civil Procedure 56 applies to this case that Ninth Circuit interpretations of Federal Rule of Civil Procedure 56 do not. According to Coral Pit, Lynn v. Chin Heung International, Inc., 852 F.2d 1221 (9th Cir. 1988) established that the Ninth Circuit should defer to interpretations of the Guam Superior Court which "studiously avoid[] recent and obvious Ninth Circuit authority in favor of original analysis." Id. at 1223. We read Lynn, however, as establishing a test which requires deference to original analysis in matters of peculiarly local importance, and less deference when interpreting rules which closely track the federal rules and "which govern[] challenges to the substantive sufficiency of pleadings." Id. at 1222. Since Guam Rule of Civil Procedure 56 closely tracks a federal rule, and governs challenges to the substantive sufficiency of an action, Ninth Circuit authority regarding the analogous federal rule appropriately governs interpretation of Guam Rule of Civil Procedure 56. We have

repeatedly held that in cases from Guam "[a] grant of summary judgment is . . . reviewed de novo, using the same standard employed by the trial court under Fed. R. Civ. P. 56(c)." Hyon-Su v. Maeda Pacific Corp., 905 F.2d 302, 304 (9th Cir. 1990) (citations omitted); See also, Unpingco v. Hong Kong Macau Corp., 935 F.2d 1043, 1045 (9th Cir. 1991) ("Where a Guam rule of civil procedure tracks a federal rule of civil procedure, we look to relevant Ninth Circuit law on the latter in interpreting the former. We review a grant of summary judgment de novo." (citations omitted). Therefore, the analogous Federal Rules case of Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1993), governs our interpretation of Guam Rule of Civil Procedure 56 in this case.

3. Right to Argue Issue on Appeal

Coral Pit also argues that the Cristobals are barred from raising the issue of the conflict between Guam Rule of Civil Procedure 56 and Guam Rule of Court 3(c) for the first time on appeal. Although we typically do not consider issues on appeal which were not presented to the trial court, we have discretion to consider matters of law never considered prior to appeal. See, e.g.,

Smiley v. Director, Office of Workers Compensation Programs, 984 F.2d 278, 281 (9th Cir. 1993). This conflict between the rules is an issue of law derived in part from our recent decision in Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1993), which was decided "during the pendency of the appeal." United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978). This issue is properly before the court.

The Guam Rules of Court which were in effect at the time of that the Guam Superior Court heard the motion for summary judgment are rules of practice which did not supersede the substantive requirements of Guam Rule of Civil Procedure 56. Moreover, Guam Rule of Civil Procedure 56 is governed by Ninth Circuit precedent for the analogous federal rule. Accordingly, we conclude that the trial court erred when it entered summary judgment in favor of Coral Pit solely because it deemed that the Cristobals had consented to the motion on the basis of Guam Rule

of Court 3(c). Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993).[2]

B. Exclusion of Opposing Affidavit

The Cristobals argue that the trial court erroneously excluded an opposing affidavit. Although a court has discretion to permit late papers in opposition, Guam R. Civ.P.56(c) and Guam Rules of Court 3(a) allow affidavits to be served until the day prior to a hearing without the permission of the court. The Cristobals argue that when the Guam Superior Court mooted the hearing on summary judgment that it effectively denied the possibility of serving an affidavit in opposition, in contravention of Rule 56(c). This argument is not frivolous, but nothing in the record indicates that the Cristobals ever proffered an affidavit, even though they claim that it was available at the January 15, 1991 hearing. Inasmuch as it relates to the relationship between the deemed consent mandated by Guam Rule of Court 3(c) and the substantive requirements of Guam

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[2] Our decision in Brydges v. Lewis, 18 F.3d 651 (9th Cir. 1994) is not to the contrary. In Brydges the local rule was permissive rather than mandatory, and the trial court warned the plaintiff in advance of the consequences of his failure to respond. Guam Rule of Court 3(c) is mandatory, and nothing in the record indicates that the Cristobals were warned by the trial court.

Rule of Civil Procedure 56, this issue is addressed elsewhere. Since the prepared affidavit was never offered, the court's preclusion of the affidavit by itself does not provide a basis for reversal.

C. Coral Pit's Entitlement to Summary Judgment

The Cristobals argue on appeal that Coral Pit's moving papers did not establish an entitlement to summary judgment. First, the Cristobals argue that Coral Pit's moving papers did not meet the formal requirements of the statute because the attached documents were unauthenticated. Second, they argue that even if the papers were accepted at face value, the papers failed to establish the absence of any genuine issues of material fact. Finally, the Cristobals argue that the papers failed to show that Coral Pit was entitled to judgment as a matter of law.[3]

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[3] Coral Pit argues that issues related to the sufficiency of the motion for summary judgment should not be considered on this appeal because they were never presented to the Guam Superior Court, and were presented for the first time on appeal to the Appellate Division. Ultimately our disposition of these issues accords with the prudential reasons behind this argument. Nonetheless, we must note that since the core issue which we decide today stems from how the Guam Superior Court truncated consideration of the motion for summary judgment when it deemed it consented to and disposed of the hearing. It would surprise us if the Cristobals had raised these issues before that court. We can decide whether the Guam Superior Court itself had an obligation to address the sufficiency of the motion for summary judgment. Compare Smiley v. Director, 984 F.2d 278, 281 (Ninth Circuit will consider on appeal an issue of law which administrative board had an obligation to address sua sponte).

1. Facial Sufficiency

Guam Rule of Civil Procedure 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters stated therein." The Cristobals contend that Coral Pit's moving papers were not supported by any authenticated documents. Coral Pit argues that a party can waive the authentication requirements of Rule 56(e) if no objection is raised before the trial court. Townsend v. Columbia Operations, 667 F.2d 844, 849 (9th Cir. 1982) ("even if [documents] were not presented in compliance with Fed. R. Civ P. 56(e), they would support a summary judgment in the absence of objection to their use").

Although the Ninth Circuit has never directly rejected Townsend, supra, on this point, it is outweighed by the Ninth Circuit's more recent and consistent holding that a court should deny a motion for summary judgment if "the movant's papers are insufficient on their face..." Sheet Metal Workers' Int'l Ass'n. v. Nat'l Labor Relations Bd., 716 F.2d 1249, 1254 (9th Cir. 1983)

(citations omitted). "This court has consistently held that documents which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment." Canada v. Blain's Helicopters, Inc., 831 F.2d 920, 925 (9th Cir. 1987); cf. Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550-51 (9th Cir. 1990) (unauthenticated document should not support a motion for summary judgment, but error harmless where both sides offer same document); White by White v. Pierce County, 797 F.2d 812, 815 (9th Cir. 1986) (unauthenticated documents cannot support opposition to motion for summary judgment).

Coral Pit argues, however, that authenticity is not disputed, and that the Cristobals themselves adopt the same exhibits in their Opening Brief before the Appellate Division. In Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550-51 (9th Cir. 1990) this court held that use of unauthenticated documents for summary judgment was harmless error where both sides relied on the same documents. Although the Cristobals did not rely on the same documents at the time summary judgment was granted, they have since, so the question of authentication is moot. Although the

Superior Court arguably erred when it decided with only unauthenticated documents, Townsend provided arguable authority for its decision. Since the Cristobal's ultimately adopted the same documents, we conclude that this was not reversible error.

2. Issues of Material Fact and Entitlement as a Matter of Law

Guam Rule of Civil Procedure 56(c) allows summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Cristobals contend that Coral Pit's motion for summary judgment failed to establish the absence of any question of material fact, and failed to establish an entitlement to summery judgment as a matter of law. Interpreting Federal Rule of Civil Procedure 56 the Ninth Circuit has held that it is "the burden of the moving party to demonstrate the absence of any material fact." Hoover v. Switlik Parachute Co., 663 F.2d 964, 967 (9th Cir. 1981). This is true, even when the party against whom the motion for summary judgment is directed has not filed any opposition. See Sheet Metal Workers' Int'l Ass'n. v. Nat'l Labor Relations Bd., 716 F.2d 1249, 1254 (9th Cir. 1983). A court should deny a motion for summary

judgment if "the movant's papers...themselves demonstrate the existence of a material issue of fact." Id. (citations omitted).[4]

The Cristobals claim that Coral Pit's moving papers which relied on letters between the parties' attorneys demonstrated an unresolved and material factual issue regarding the authority of the Cristobal's first attorney, Teker, to reach a settlement agreement. Coral Pit, on the other hand, notes that a majority of jurisdictions recognize a rebuttable presumption that a client authorizes a settlement entered into by client's attorney. See, e.g., Capital Dredge and Dock Corp. v. City of Detroit, 800 F.2d 525, 530-31 (6th Cir. 1986) ("Generally, when a client hires an attorney and holds him out as counsel representing him in a matter . . . [t]he third party may rely on the attorney's apparent authority unless he has reason to believe that the attorney has no authority to negotiate a settlement.")

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[4] Although dicta in Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984), and White by White v. Pierce County, 797 F.2d 812, 815 (9th Cir. 1986) suggest that failure to respond to a motion for summary judgment might justify granting the motion, it is clear that in both cases the trial and appellate courts carefully evaluated the moving papers and determined that there was no issue of material fact. See especially White by White v. Pierce County, 797 F.2d at 815 ("Even in the absence of opposing affidavits, summary judgment is inappropriate where the movant's papers are insufficient on their face").

The Cristobals argue, however, that determination of apparent authority is an issue of fact (Nat'l Labor Relations Bd. v. Donkin's Inn, Inc., 532 F.2d 138, 141, cert. denied 429 U.S. 895 (9th Cir. 1976) which in this instance went undetermined because the Guam Superior Court acted as though there were no issues of fact to resolve. The Cristobals argue that any presumption in favor of Teker's apparent authority "burst" when Teker wrote to Lannen on March 16, 1990: "As I mentioned I still don't have the authority to give you this letter but I think I will." Under this theory Teker had no authority until it was explicitly reinstated. Guam Code Civ. § 1963(32); Rauer v. Rynd, 27 Cal. App. 556, 150 P. 780 (1915) (interpreting Cal. Civ. Code § 1963 (now codified as Cal. Civ. Code § 3547).[5] The Cristobals argue that this "bursting bubble" or Thayer theory of presumption governs this situation because the presumptions of fact before the Superior Court are governed by the Guam Rules of Evidence, 6 G.C.A. § 301, which track the Federal

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[5] Guam adopted many of its statutes from California statutes. California interpretations following adoption are persuasive. See, e.g., Guam Hakubotan, Inc. v. Furusawa Inv. Corp., 947 F.2d 398, 401 (9th Cir. 1991), cert. denied 112 S. Ct. 1996 (1992).

Rule, and that the Federal Rule embodies the "bursting bubble" approach to presumption. Compare In re Yoder, 758 F.2d 1114, 1118-20 (6th Cir. 1985). In the alternative, the Cristobals argue that Teker's statement at the very least created a presumption which shifted the burden of proof regarding Teker's authority onto Coral Pit.

The Cristobals also contend that Coral Pit was not entitled to a grant of summary judgment as a matter of law because Coral Pit had not accepted the settlement agreement which forms the basis for this summary judgment. Specifically, by adding additional terms in their acceptance letter, Coral Pit's supposed acceptance is, as a matter of law, a counter-offer. Coral Pit argues, however, that the acceptance of the proposed terms was clear and unconditional, and that acceptance did not hinge on the additional, separable terms.

Courts have authority to enforce settlement agreements. See In re: City Equities Anaheim, Ltd., No. 92-56266, 1994 WL 145112 at *2 (9th Cir. April 26, 1994); Wilkinson v. F.B.I., 922 F.2d 555, 557 (9th Cir. 1991). The issue contested here is whether there was an enforceable agreement as a matter of law. This dispute focuses

exclusively on whether the two terms added in the second to last paragraph of Lannen's letter of April 24, 1990 qualify his acceptance and constitute a counter-offer. (See, e.g., Landberg v. Landberg, 24 Cal. App. 3d 742, 750, 101 Cal. Rptr. 335 (1972) or whether the letter is an unequivocal acceptance with an expressed desire for different terms which binds the parties (see, e.g., Chicago Bridge & Iron Co. v. Indus. Accident Comm'n, 226 Cal. App. 2d 309, 316 n. 2, 38 Cal. Rptr. 57 (1964)). The Cristobals argue that these added terms are material terms, and that materiality, not the conditionality of the language, should govern whether the terms are treated as a counter-offer. Bartone v. Taylor-Benson-Jones Co., 119 Cal. App. 2d 79, 258 P.2d 1054 (1953).

These issues, i.e., the existence of Teker's authority to settle the suit, and the enforceability of the purported settlement agreement as a matter of law, turn on interpretation of the Guam's substantive law of agency, professional responsibility, evidence, and contracts. We recognize the local Guam courts as uniquely qualified to resolve the many statutory and common law issues raised in the Cristobals appeal. Because the Superior Court deemed the Cristobals to have

consented to the motion for summary judgment on the basis of its Rules of Court we review a record which leaves us bereft of the trial court's wisdom on these issues.

As noted above, we review these issues de novo. Nonetheless, our power to decide the law in this case is tempered by our concerns for comity. In Guam v. Yang, 850 F.2d 507, 510 (9th Cir. 1988) (en banc) we noted that "Congress has specifically required that relations between the federal courts and Guam's local courts be the same as those between the federal and state courts." Although this is not functionally accurate because of this court's direct appellate authority over Guam's local courts, the concern for comity expressed by Congress, and by this court, teaches us that this court need not address some issues of peculiarly local concern. Cf., Lynn v. Chin Hueng International, Inc., 852 F.2d 1221 (9th Cir. 1988) (Ninth Circuit gloss in a matter of peculiarly local importance and broad discretion not binding on Guam Courts).

This court's deepest concern in this case is to see that courts within this circuit do not use rules of practice as the basis for entering summary judgment without independently evaluating the

sufficiency of the moving papers. Henry v. Gill Industries, Inc., 983 F.2d 943 (9th Cir. 1993). This case perfectly demonstrates the prudence of such a rule. Bereft of the trial court's independent evaluation of the merits of summary judgment an appellate panel is left to decide the issues with only a meager record and bickering briefs. The Cristobals have asked this panel to address the sufficiency of the entry of summary judgment, and by doing so have invited this panel to create precedent for Guam regarding the law of agency, professional responsibility, evidence, and contracts without any guidance from the local courts regarding the application of Guam law to this set of facts. Although we recognize our right to establish binding precedent, we decline the invitation to do so.

## IV. CONCLUSION

We hereby REVERSE the order affirming the Superior Court's entry of summary judgment and REMAND to District court of Guam Appellate Division with instructions to REMAND to the Superior Court of Guam for its independent determination of Coral Pit's entitlement to summary judgment.